LORD BROUGHAM'S

SPEECHES IN THE HOUSE OF LORDS,

26TH AND 28TH OF JULY, 1853,

ON

COUNTY COURTS

AND

LAW AMENDMENT.

LONDON:
JAMES RIDGWAY, PICCADILLY.
1853.

IRISH COMMON-LAW PROCEDURE BILL.

26th July, 1853.

In moving the second reading of this Bill, I have the satisfaction of finding, that it has been prepared with great care, by men of ample learning; intimately acquainted with the practice of the law, especially in Ireland to which it relates; and of competent skill in the framing of statutory provisions. It was introduced into the other House by my learned friend, Mr. Whiteside, late Solicitor-General of the sister kingdom, who explained and supported it in a statement eminently powerful, as it was perfectly luminous, — a statement received with universal applause, and worthy in every respect of his high reputation. Introduced at the beginning of the Session, it has undergone repeated discussion in the course of the intervening period, and although only passed within the last ten days, it had gone through all its stages with an almost general assent.

It had been submitted to the heads of the law in Ireland, and been approved by the most distinguished members of the profession there, both on the Bench and at the Bar. I will not affirm that

all the details have received this approval, but its general scope, and its main provisions, I feel justified in repeating, are sanctioned by the high authority I have referred to.

Unconnected with the sister kingdom, I have been asked to take charge of this Bill, from the circumstance being well known, that my opinions go entirely along with its provisions. It is now a quarter of a century since I brought before the other House of Parliament, a statement of the various anomalies, defects, and abuses in our law, but more especially in our judicial system; and I had occasion, therefore, in trying that system by the test of its agreement with principle, to examine the rules which ought to preside over its structure, and to govern its procedure. A very large proportion of the defects then denounced, have since been removed in this country, while some of the most glaring continue still the opprobrium of our jurisprudence. But it gives me unalloyed gratification to find, from the Bill to which I now solicit your attention, that all the principles laid down on that occasion, have been fully considered by its learned authors; that hardly one has been overlooked by them in framing the measure; and that by far the greater number of the proposals made, have been embodied in its provisions. But I will go further and express my admiration of the Judicial reforms actually effected in Ireland of late years. We may well envy as well as applaud the sister kingdom, when we look to the vast progress which she has made in the constitution of her Courts; in some

improvements going before us by half a century; adopting others, which we ourselves have not yet made, to the incalculable benefit of our fellow subjects there. Thus the Civil Bill process has given them the great advantage of Local Courts for upwards of half a century. The Quarter Session jurisdiction has had, during that period, the valuable aid of the Assistant-Barrister, always chosen as Chairman, while in no instance have our Justices availed themselves of the County Court Judge in this manner. For the last three years, a rational and effectual course has been taken for equalizing the business in the Superior Courts, and there is no longer in Dublin the complaint so often and so justly made here—that one Court in Westminster Hall may have little to do, while another is overloaded. The suits are sent to all the three Irish Courts by rotation, in five and twenties, since the 13th and 14th of the Queen. But there is a natural anxiety further to amend the Procedure, to adopt the improvements introduced here by the Act of last Session, and to add others which are of greater value than those.

The Bill, then, which I am now to move, consists of two branches. It applies to Ireland the provisions of that Act, a hundred and forty odd clauses, having this object; its remaining clauses carry those provisions a great deal further, adopting some of the most important of the changes recommended by the Second Report of the Commissioners—a document which it is impossible to praise

too highly for its enlightened, and at the same time, judicious views. But this Bill, in some material particulars, is in advance of the Report; and I must at once distinctly affirm, that the steps which it proposes to take are both perfectly safe, and most important amendments of the law. As must ever happen in this course of legislation, we shall meet with resistance from two opposite classes of objectors, one dissatisfied with us for not going far enough, the other alarmed, lest, going so far, we should hereafter be obliged to go farther than is safe. But I well remember the answer made to this last and very prevalent objection, by one who was no friend of innovation,—no rash reformer,—no speculative dealer in changes, my lamented friend Sir W. Follett, one among the rare instances of parliamentary, all but equalling professional, success. A measure which he supported was assailed with the cry, "You will not be allowed to stop here." "Wait," he replied, "till they attempt to push us on. Is the thing right to be done? That is the question now. If right, do it; and resist when they would have you do what is wrong!" This was, I believe, among the last occasions on which his persuasive voice was heard. Soon after, with his sorrowing friends of the Senate and of the Bar, I followed his remains to a premature grave:—*cujus corpus a me crematum est, quod contra decuit ab illo meum.**

In all that regards Procedure, the objects to be

* Cat. Maj.

ever kept in view, are aiding well-grounded claims, discouraging unjust ones, and expediting all litigation:—in short, throwing open the Courts to suits which ought to be brought thither; closing the door to such as ought not; and quickening the decision of all. The provisions of the Bill are framed with a due regard to these incontrovertible maxims, although I am far from asserting that there may not remain further improvements to make Procedure in all respects accord with them. In order to sift the cases, as it were, and apply these principles, there is nothing more important than encouraging compromise, or speedy termination of all controversy, by the permission to pay money into Court, or tender amends. This, which ought to be favoured by all means, is, on the contrary, by no means a favourite of the law. Nothing can well be conceived more absurd than the old rules which governed this matter, capricious in some respects, self-repugnant in others. The professed principle was, that any liquidated sum could be paid into Court, and yet payment was not allowed on a contract to deliver goods at a fixed price, nor in an action of debt for a fine in a Manor Court, nor in trover for goods certain; nay, in trover, even producing the goods in Court was not permitted, although the action nominally for their value, or rather for the tort of converting, the value being the rule for estimating the damages, was in reality brought to obtain the goods themselves. These absurdities and gross inconsistencies, under the dis-

guise of excessive refinements upon a principle, are now done away; but still there is no power to pay in cases of tort, which, however, are exactly those where payment should most be favoured, as they are those where feelings are most excited. Here I have the misfortune of differing with the learned Commissioners. In the cases to which they refer, as giving more satisfaction by trial in Court, that trial may still be had though the money be tendered, because the plaintiff may refuse; and as for the chance of a wealthy defendant paying to prevent expense, he has the very same opportunity at present of buying off the plaintiff; he may agree to a verdict. The Bill now before us most justly provides, that in all cases whatever, there shall be the power of paying into Court. It goes as far as I had gone in the Evidence and Procedure Bill; only requiring the leave of the Court in cases of slander and seduction. The tendency of the power thus extended to discourage needless actions, and also to discourage vexatious defences, is manifest. I could have wished that a further step had been taken in the same direction, by improving the Law of Arbitration. The provision in the English Act of 1833, making submissions irrevocable, was adopted in Ireland some years ago. But I wish they had been in advance of us in further preventing litigation by reference. I hope, in the course of a few days, to lay a Bill before your Lordships, having this important object in view; and that its provisions, if

adopted in England, will be added to the Irish Bill, I can have no manner of doubt.

Suppose now that no compromise between the parties has taken place and the suit must proceed, the first matter dealt with in this Bill is the compelling an Appearance by providing a substitute where personal service cannot be had. Strictly speaking, this should have preceded our consideration of paying into Court, as that assumes an Appearance; but substantially we have been treating of discouraging vexatious proceedings generally. Now, nothing can be more clumsy than the process of outlawry to compel an appearance. If the party has no tangible property, nothing whatever is effected: if he has, his adversary must resort to the Exchequer for his satisfaction; and then it may well be that the defendant is despoiled of his property in his absence on the other side of the globe, and without any intimation of the proceeding, either to himself or his connections. Of late years a material improvement has been made in this process; the Common Law Courts adopting the Chancery procedure; but there is still a great imperfection. Application to the Court, or to a Judge at Chambers, must be made, for leave to substitute the constructive to the actual service; and nothing can be more prejudicial to the interest of parties than these numberless applications. Indeed, by the late Act, nine or ten attendances at Chambers are sometimes required, where one or two should suffice. It is one of the greatest defects of

that Act. The Bill which I am now moving, steers clear of this fault, and in respect of Appearance, wisely proceeds upon the plan which has been found to answer in the Civil Bill Court, and which does not require application for leave.

The defendant having now appeared, we are to consider the statements of the parties for bringing before the Court their respective cases; in other words, the Pleadings. And first, it is proposed that all these statements should be Verified by the oath or affirmation of the party making them. I am aware that this has not the sanction of the learned Commissioners; a thing more to be regretted than to be easily comprehended. The tendency of the Verification will be most salutary, both in preventing unfounded claims and in checking groundless defences. The objection that sometimes law and fact are so much blended as to deter scrupulous persons from verifying, is really of no avail in the argument, since the matter of fact alone would be sworn to. Then observe how the law now stands. All pleas in abatement must be upon oath, and every one is aware how the requiring this at once stopt a vast proportion of the vexatious pleadings formerly used for the sake of mere delay and of increasing expense. Again, in all Chancery suits, the defendant's statement is on oath, but, most absurdly, not the plaintiff's—so that a Cross Bill is required to make him verify. But in the County Courts at all times, and since 1851 in all Courts, it may be said

that parties plead upon oath, because in the great majority of cases both are examined. Incalculable has indeed been the advantage of this change in the Law, but I am clearly of opinion that it requires an addition—the Court should in every case have the discretionary authority to call for the parties; else, they in some cases may, the one from unwillingness to undergo cross-examination, the other from dread of putting his adversary in the witness-box, be kept back; whereas the Judge, only desirous to get at the truth, regardless of who may be injured by it, would examine both parties where the purposes of the inquiry appeared to demand it. Nor is it any answer to this proposition, that the party whom the Court wished to examine might keep out of the way. In the Law which I am contemplating, provision should be made for preventing the absence of a party without reasonable cause; and whoever was not forthcoming would always, without any such provision, expose himself to the observation that he kept away when called upon. I am now, however, upon the question of Verification, and for the reasons which I have assigned, I entirely approve of this enactment in the Bill, conceiving that it rests upon the same principle, with the other cases in which the party's oath is required.

The Pleadings then thus Verified, in what shall they consist? Here I must avow my entire approval of the Bill. It proceeds upon the broad principle,

always the guide of those who would amend procedure, nay who would amend the Law generally, the principle exemplified in almost all the measures propounded by me, from the Libel Bill of 1816, down to the present day, and the greater part of which have been made Law—the substitution of Natural for Technical procedure. This involves at once the abolition of Forms of Action, and surely nothing can be more glaringly absurd than the retaining of these, and of the pleadings consequent upon them. The object of all pleading is to let the parties know distinctly what they come to meet, and to let the Court know what their contention is, what they come prepared to maintain or to prove. Then see how little the forms of action tend to give this distinct information. Why, I will remind those who are lawyers among your Lordships, and inform such as are not, of what in 1828, I shewed in the Commons, that the self-same form of action and the self-same words in the declaration, the plaintiff's statement of his case, may apply to at the least seven entirely different things—money paid to one person for another's use—money received on a consideration that fails, and the failure may be in a variety of ways, but the form of action and the description in the statement are the very same in all—money paid under mistake in point of fact—money paid to a stakeholder in consideration of an illegal contract with another person—money paid to a revenue officer for releasing goods illegally detained—to try the right in an office, instead of trying by an assize—to try the

liability of the landlord for rates levied on his tenant —and in other forms of action, as trover, it is even worse; a chattel being in the possession of another than the rightful owner, may be so simply by his finding it—or he may pretend title to it—or it may have been deposited with him—or he may stop it because the price was not paid—or it may have been sold after the original owner's bankruptcy, and the assignees seek to recover it—or it may be held by the assignees, and the bankrupt disputes his bankruptcy—or it may have been unlawfully taken in execution, and that process is impeached on one of many different grounds of fraud; or it may have been misdelivered by a warehouseman or carrier. So the same words in a plea may cover as many different defences as the words in a declaration cover causes of action. The Bill now before us sweeps away all this useless and worse than useless lumber which keeps the desired information from both parties and Court; it requires the very claim with its grounds to be plainly stated; the very answer with its grounds to be plainly given. It likewise abrogates that rule which at Law, though not in Equity prevails, contrary to all natural reason, that no one shall deny the relevancy of his adversary's statement without admitting its truth; giving power both to traverse and demur. It further abrogates the generally unreasonable rule against replying, or rejoining several matters, giving power to plead as many pleas in each stage as the parties can

Verify. The great benefit of this change I need hardly dwell upon, in the death blow which is thus given to so much confusion, uncertainty, useless subtilty, worse than useless chicanery, all at the expense of time and labour to the Court, delay, vexation, and expense to the suitor; but it gives me no little satisfaction to think that here the provisions of the Bill have the sanction of the learned Commissioners. For although the English Act of last year did not abolish the forms of action, it left them little more than a nominal existence, when the 41st Section distinctly allowed different causes of action, however various, except only replevin and ejectment, to be included in one. Indeed the Commissioners had reported in favour of an entire abolition, and had originally so framed the Bill, which your Lordships altered, conceiving that as drawn it would not work.

Respecting one provision of the present Bill under the head of pleading, I have considerable doubts. The summons or writ, and plaint or declaration, are proposed to be one, and so the appearance and defence or plea, are to be one—that is, there must only be one proceeding both by the plaintiff and defendant. I rather agree with the Commissioners, who considered that this junction would have the effect of making a plaint, or plea necessary in cases where the writ or summons, and the appearance might suffice. This, however, is fit to be considered in the Committee, and I do not profess to have formed a very confident opinion upon the subject.

The Trial is now to proceed, and here the Bill introduces that most salutary change which I submitted to your Lordships in the Evidence and Procedure Bill, and which afterwards had the entire concurrence of the Commissioners, though my noble and learned friends in this House opposed it—I mean the enabling parties in all cases to try by the Judge without a Jury, provided both consent. The only doubt which I have on this important head, is whether, at least in the beginning, we should not confine this option to cases of contract and quasi contract. That ultimately the option should be universal, I do not doubt; but possibly there are reasons why in the first instance cases of tort should be excluded.

Upon that which next comes to be considered, the Evidence, there are several useful improvements in the Bill. One on which I set great value is the general power given to compel the production of documents, which by an error in our English Act has been found to be cramped by the requiring knowledge of possession to be proved. Here one could have wished that the salutary rule in the Scotch Courts had been adopted, the want of which we so often experience in ours—the requiring previous notice to be given of all documents before they can be used in evidence, unless their recent discovery be shewn. No one can have long practised at Nisi Prius without being aware how such a rule would tend to prevent vexatious suits, pertinacious defences, and pro-

fessional manœuvres. An example may suffice of the latter. The Plaintiff had proved his case; the Defendant's Counsel had not put a single question in cross-examination. Then said the Judge, "Of course you have no case, and the Plaintiff must have a verdict." No, said I, it must be the Defendant who has the verdict; and I produced the receipt, which his attorney had thought fit to keep back, which must have kept the cause out of Court by the Scotch rule, and which would also have prevented the professional gentleman from pocketing his costs. The dishonesty of the Plaintiff, if he did not act from entire mistake, certainly deprived him of all right to complain.

Connected with this head I could also have wished that in the most important part of the Bill, the granting Equitable procedure to Common Law Courts, a power of discovery had been more extensively given, in order to preclude the necessity of parties going from one Court to another, or from one action to another for their remedy. But it contains other most salutary provisions which have this object in view. Thus, nothing can be more absurd than only giving the Plaintiff in ejectment his full remedy by two actions. He obtains verdict, judgment, writ of possession, in one; he must bring another for the mesne profits, to which his success in the first entitled him. The Bill most properly enables him to recover both the possession and the mesne profits by the same suit. So when a person complains at law of an infringement of his

patent, or of any other tort which gives him a right to recover damages, he cannot stop the acts of the wrong doer without going into a Court of Equity. The Bill, in all cases of disputed right, where a Court of Equity would grant an injunction, arms the Courts of Law with the power of staying the exercise of the Right of the Defendant, pending the proceeding, to ascertain it. But this is not the only instance in which the principle of Fusion is adopted by the Bill. It makes Choses in Action generally Assignable, allowing the Assignee to sue in his own name without resorting to Equity; but it provides of course the necessary guards to this right, and among others, establishes a Registry of Assignments. It further abolishes the vexatious rule that an equitable interest, as an agreement for a lease, cannot be used at Law in bar of an ejectment; and that other vexatious rule which makes an outstanding legal estate a competent defence in such case. The former of these amendments has, I understand, for many years been introduced into the procedure under the Civil Bill jurisdiction, an equitable lease being there a bar to ejectment.

But now let us return to the action which we have been following through its successive stages; and we are brought to the result, Judgment and Execution. This Bill contains several salutary provisions, both on this head and on proceedings in Error. But I shall only detain your Lordships by stating the improvement which it propounds upon the process of Exe-

cution. To be sure, the Law a few years ago did exceed itself in absurd distinctions and refinements under this head. At the period to which I have more than once referred, in 1828, when a creditor had obtained judgment, he could only have the fruits of it in case his debtor possessed real property, or personalty impossible to be concealed; and he might openly be possessed of any amount in stock, bonds, bills, Bank notes, nay, in moneys numbered, and the execution could not touch a farthing of it. The very cash which he had borrowed, and for which he had been sued and found liable to repay it, might be lying on his table when the sheriff entered, and that officer touched it at his peril. Lord Mansfield inclined to relax this rule, so far as money was concerned; but he could not; one judge held that it would be removing landmarks; another (Lord Ellenborough), that it would be unsettling the fundamental principles of our Jurisprudence. The greater part of this absurdity has for some years ceased to disfigure that system. Since 1833 in England, since 1840 in Ireland, money and Bank notes may be taken in execution; but still the process is most imperfect; as regards bonds, bills, stock, shares, annuities, a suit is required. This Bill provides for the immediate transfer of the property; for the Plaintiff's action in the Sheriff's name on bonds and bills; for the attachment of stock and shares, so as to be a stop on any transfer by the Debtor; and finally for the beneficial possession by the Creditor, in case the debt be not paid forthwith.

I am sensible, my Lords, of the imperfect manner in which I have aimed at doing justice to this important measure. I have barely given an outline of those portions which are in advance of our English Procedure Law; nor have I by any means even recited the whole of these improvements. The Bill was brought up from the Commons a week ago, and I have not had it more than a day or two in my hands. A hundred and forty of its clauses are taken from our Act, but with considerable variations; some of them necessary for adapting them to Ireland, and others improving upon those provisions. A hundred and twenty are almost entirely new; and to these I am more especially anxious that the attention of this country should be directed. But the most important of them are not now propounded for the first time. How long ago do your Lordships think was the greatest of these changes in the law attempted—the making choses in action assignable? Just within one year of two centuries. This rational course was proposed by a Committee of the other House, on which sat men renowned in history; some illustrious for their great deeds alone, others for their virtues also. Among its members we find named the Lord General Cromwell, then representing the town of Cambridge, and Sir Matthew Hale, afterwards the great Chief Justice. This proposition was the eleventh of the fourteen for the Amendment of the Law, which that Committee reported to the House; and most gratifying is it to think that all the others

have since become the law of the land; brought forward though they thus had been at no very auspicious season. It bears out that most consolatory remark of Lord Bacon, which has so often cheered one under temporary disappointment, that hardly ever was there a good proposal made for amending the law, which did not sooner or later bear fruit. Earnest as my desire is to carry the whole of these improvements this Session, being quite certain that, if effected for Ireland, they must immediately be adopted here; I yet cannot but admit that the absence of the Judges on circuit, and of the Chief Justice, as well as Lord Truro, and other law Lords from this House, makes it difficult to proceed now with the whole of the Bill. We may, however, at any rate pass all the provisions which have already been enacted for England, with the changes necessary for adapting them to Ireland, and with such of the other improvements upon our Procedure as cannot well admit of controversy. All that it is necessary now to do, is to give the Bill a second reading, and in the Committee we can settle what portion shall be postponed.

COUNTY COURTS

AND

LAW AMENDMENT.

July 28, 1853.

THE Petitions which I have just laid before your Lordships, bring under our consideration the important subject of County Courts, and several of the defects existing in the great system of Local Judicature. The Bill which I presented at the beginning of the Session, for further extending that jurisdiction, stands for a second reading this day, and I therefore take the opportunity of stating the course which I propose we should pursue with it, and with this important subject in its various branches.

That some great defects, and not a few erroneous provisions, found their way into the system, is not to be wondered at, when we recollect the manner in which the Bill of 1846 was introduced and passed. The responsibility of these defects I must peremptorily disclaim. The original and larger measure of 1830 and 1833 had been rejected by a narrow majority; and when the partial one introduced by my noble

and learned friend (Lord Lyndhurst), was, on his quitting office, adopted by his successor, I in vain urged the postponement of it, from the end of July, when it was resolved that it should be hurried through Parliament, until the next Session, when time would be afforded for removing its defects, and bringing it to a nearer resemblance with the measure of 1833, to which the new Government of 1846 were as much pledged as I was myself, they having been in office with me when I first brought it forward. Unfortunately, it was driven through both Houses between the end of July and the end of August, when but a few Members of either House remained in town. One of the worst consequences of this precipitate proceeding was the not paying a due attention to the choice of the Judges in some instances, and in all, the underrating the importance of their office. Aware of that importance, I had in 1833 proposed such a salary as should secure the services of men eminent in the profession. Lord Cottenham deemed a maximum of £1200 sufficient, and at once awarded the same salary of only £1000 to all the sixty whom he appointed, the former plan having been to make £1500 the average, and award £1200 to one, £1800 to another, according to the kind of the districts in which they officiated. In order to save compensation in the case of local Courts abolished, the other error was committed of appointing persons who had presided in those Courts, and who were of various capacities. I am,

however, most willing to admit that generally the selection was well made, and that a body of men were appointed who have given, and justly given, satisfaction. Of this no better proof can be required than the manner in which the system has worked, (with all the imperfections arising from the manner in which it was established), and especially the small number of the reversals of the judgments pronounced by those learned persons.

It would be difficult to overrate the benefits which have been derived from this great amendment of the Law; and they are no friends of our Judicial System who treat the new Tribunals with contempt; still less are they its friends who regard them with jealousy. This jealousy is, with the paradox usual in such feelings, often found to alternate with contempt, and they are termed Small Debt Courts, in order to lower them in public estimation. But though, unfortunately, this name was at first applied to them in the Act, and has continued, nothing can be less descriptive of their functions. They were, by the original Bill of 1830 and 1833, to have had jurisdiction as far as £100. The Act of 1846 reduced this to £20, but Mr. Fitzroy's most important Act of 1850, the greatest service that any layman ever rendered to the law, increased this to £50, and we then added the optional clause taken from the original Bill, giving them unlimited jurisdiction by consent in all cases, not only of any amount, but of any description. Then the Charit-

able Trusts Bill, the Succession Duty Bill, the Customs Regulation Bill, all now on the eve of passing, add important judicial functions. But take only their present jurisdiction, and compare it with that of the Superior Courts; they had above 400,000 plaints, and tried more than half of them, yearly, before the extended jurisdiction; and in 1851 the plaints were above 440,000, for an amount exceeding £1,600,000. Above 13,400 for sums between £20 and £50 were disposed of, 8,200 being tried. And let me observe in passing, that there being an appeal to the Courts above on all matters of Law arising in this class of suits, there were only 38 appeals brought, and only 8 reversals of the local Judges' decisions, being no more than one in a thousand of the cases tried. Now, they who underrate the importance of what they contemptuously call "Small Debt Courts," would do well to bear in mind that while they tried above 8000 actions between £20 and £50, the Superior Courts tried altogether in the same year, 1851, exactly 1943; this being the whole number of Judgments, including those by consent. The County Courts, therefore, tried four times as many as the Superior Courts, even if we suppose that of those tried by the latter none were under £20. As, however, a considerable number were, the disproportion was very much greater than four to one.

This great change in our judicial system, having now been in operation for above six years, it is

manifestly our duty to profit by the experience thus afforded of its working. For, as I have once and again reminded your Lordships, in all proceedings for the Amendment of the Law, but indeed it may be said in all the alterations which are made in any branch of our polity, the Lawgiver is bound, not only to devise his measures with all deliberation, but carefully to watch the operation of each, after it has been adopted. Human foresight can only act within narrow limits. Little are we ever able to see of what lies in advance of us; and this renders the utmost circumspection necessary, that we may at least profit by examining all that can be descried on either side. Yet even here we may not be so secure, as in casting our view behind us, and at least benefiting by the experience of the past. The wise lawgiver then will not only in steering his course ever have the lead in his hand that he may avoid shoals and sunken rocks; not only will he by the log ascertain the pace he moves at; but he must constantly take observations, by which he may discover if peradventure he has not departed from his course; and then, scorning to conceal his error, at once avowing his deviation, it behoves him instantly to regain the right track, in order to reach the desired haven. Thus are we now bound to examine carefully the errors which experience may have pointed out in our late changes of the law, as well as to supply the defects which were manifestly left in the plan on its first adoption.

I hear it indeed said, when I have urged, both last year and more lately, the appointment of a Commission to inquire into the whole subject, that the experience has been too short, and that we should wait till the County Courts have been longer in operation. The answer to this objection seems decisive. Although the time has been short, the space has been vast over which the system has acted. Sixty Courts sitting twelve times a year and in seven places each upon an average, gives the vast number of above 30,000 Courts holden. These have been under a variety of Judges and officers, with a still greater variety of practitioners, and of suitors; so that it is contrary to all probability that any considerable defects or faults in the system should not have been felt and brought to light. It would be endless to give all or nearly all the instances; one or two must suffice.

The whole finance of these Courts requires the most searching investigation. The fees or taxes on all their proceedings I have repeatedly brought before your Lordships, as an error of the grossest kind, and a hardship the most cruel to the suitor. In 1851 the suits were for £1,624,000, of which £815,000 were recovered by Judgments, and £100,000 paid into Court without Judgment. Of the remaining £709,000 about £500,000 were paid or settled out of Court on the actions being brought. The fees exacted amounted to £272,000, or 30 per cent on the sums recovered in Court; but take it on

the whole £1,400,000 and it is 20 per cent on all the money recovered in and out of Court, by suit or by threat. Now this has been over and over again allowed to be a grievance utterly intolerable. The Judges in the Courts above are paid by the State; the whole administration of Justice ought so to be paid; and the suitors in the County Courts alone are compelled to pay for the Judges who decide their causes. Some fees may be retained, as those on execution, because when the decision shews the party to be in the wrong, it is his own fault if he does not pay without a levy upon his goods; but allowing £60,000 of the sum now raised to be thus taken in execution fees, there remain above £200,000, which all are agreed must be taken off. But then inquiry is necessary as to the manner of supplying the loss and paying the officers. Such errors as have been committed in apportioning costs must be corrected; and the gross anomaly no longer be suffered to exist of having a judgment by consent, and without any contest, almost as expensive as one where the cause has proceeded to hearing.

When I first denounced these grievances before your Lordships, my Noble Friends opposite and my Noble and Learned Friend on the woolsack, admitted that they must without delay be removed; and it was deemed inexpedient to delay the remedy until a Commission should be able to report. It appears however that many other matters, and some of them connected also with the finance of the Courts, deserve examination. I have communicated to my

Noble and Learned Friend the results of a most extensive correspondence with the officers and practitioners, and I have also handed over to him a great portion of the letters and the memorials themselves. Upon some of the most important points there is an universal concurrence of opinion, among the rest, upon the finance. Upon other points there is a considerable difference of opinion. But the whole subject seems now ripe for inquiry.

The extension of the Jurisdiction is one of the most important of the subjects, and it is one to which the numerous Petitions that I have presented to your Lordships both to-day and on former occasions are very anxiously addressed.—The giving a discretionary power to the Judge of allowing a second action when the debt clearly exceeds the sum sued for, seems an obvious improvement. I have known six cases come in the course of a single circuit before one of the learned Judges, in each of which the sum given up for the sake of bringing the claim within the jurisdiction, was equal to the sum demanded, and in one instance thrice as large. There could be no harm in empowering the Judge to allow a second suit to the limited amount of £50, where, by the Defendant's admission, or by some written evidence, it plainly appeared that the surplus was due.—Again, the want of all Equitable Jurisdiction is loudly complained of. I purpose deferring the further consideration of the Bill, which I early in the Session presented for giving this extension, because I con-

fidently hope the Commission about to be issued will fully examine this important question. Under proper guards, as by allowing a removal in the nature of a *certiorari*, enabling all the facts to be ascertained in the County Court, and permitting an appeal upon the Equity, there seems no kind of reason why the extension should not be given.—An improvement upon the Law of Evidence might also be made, beginning with these Courts, as the former amendment of the law did; but I think it should be extended to all the Courts. I would give the Judge in all cases the discretion of calling before him the parties, when for any reason they did not appear to be examined. It frequently happens that one is not called in his own cause, and that then the adversary is apprehensive of calling him, and so the truth is excluded. The Court has no interest in yielding to this play of the contending parties; it only desires to come at the real merits of the case, and it should be armed with the discretion to which I refer, to be used, of course, with a due regard to the circumstances, such as the necessary absence of a party.

The important provisions on Arbitration in the County Courts' Extension Bill formerly presented to your Lordships, and which you were pleased to entertain favourably, I have thought it expedient to make the subject of a separate Bill, which I am now about to present; and it greatly extends those former provisions, in consequence of the very important suggestions of some esteemed friends of mine,

Gentlemen belonging to the City, whose efforts in the improvement of the mercantile law cannot be too highly commended. Indeed, they are well known to such of your Lordships as have either in this Session or in 1849 attended the Committee on the Bankrupt Law. I need only mention the able and worthy Chairman of the London Association, Mr. W. Hawes, who first made me fully aware of the great hardship inflicted on traders by the state of the law respecting Arbitration. Its general defects had indeed been often the subject of discussion, and to remedy them was the purpose of the clauses in the County Courts' Extension Bill. But the evil consequences arising from the utter inefficacy of the common partnership article for referring disputes, had not been sufficiently considered. I am here most fortunate that I address your Lordships in the presence of my noble friend opposite (Lord Overstone),—fortunate on every account, because they who have had the advantage of sitting with him in Committees upon the Amendment of the Law, whether as regards Registration, or Bankruptcy, or the Criminal Code, are aware how great acuteness and sagacity as well as ample experience he brings to the discussion; but particularly I am fortunate in stating before him this defect, the consequences of which he must so often have seen, I mean that in a partnership, charter party, policy, or other deed, an article to refer disputes, is mere waste paper. Until the difference arises between the partners, of course it is in abeyance; and the moment it is wanted to make a speedy end of

the matter in dispute, and to save the expense as well as delays and anxieties of litigation, the parties having quarrelled, both will not agree either to name an arbitrator, or if the deed has named one, to proceed before him. Now the law as it now stands gives absolutely no remedy. Arbitration, except at *Nisi Prius*, is no favourite with any of our Courts—neither Courts of Law nor of Equity. The most solemn covenant to refer that men can enter into, gives no right to damages at law for the breach of refusing to refer, or to specific performance in Equity, by compelling the reluctant party to proceed. Nor can any such covenant, or any other agreement to refer, be pleaded either at Law or in Equity against a party choosing to sue before the Courts in the teeth of his most solemn obligation to settle the whole before the private tribunal. It is, indeed, barely twenty years since every kind of submission was revocable at the pleasure of either party; and although that great defect was then removed, nothing can be more imperfect than the law respecting Arbitration still is. Its more glaring defects are removed in the Bill which I shall now present to your Lordships. It embraces the Arbitration Clauses of the Bill formerly laid before you, giving the benefit of the County Courts to all persons who choose to refer their disputes, of whatever kind, and who would avoid the great delay and expense attending references before private arbitrators whose remuneration depends

upon the length of the proceedure. But as there are cases in which parties may prefer referring to private individuals—those in whom they may have a special confidence, or who may from professional habits be peculiarly fit to conduct the inquiry—the means are afforded of making such a reference effectual, both by compelling parties to perform their agreement or covenant of reference, and by providing for the easy and expeditious conduct of the proceeding. I venture to state, that whoever takes the trouble to examine this Bill, will find it satisfactorily framed; and I speak not certainly of my own workmanship—for useful changes are made on the clauses in the County Courts Extension Bill, and the clauses which I had framed for meeting the wishes of the City gentlemen, having undergone great alteration, have received material improvement beside the addition of some valuable provisions. I have had in this the inestimable advantage of my learned friend Mr. Francis Russell's assistance — a gentleman well known in the profession as the author of the admirable work lately published on the Law of Arbitrament.

I would fain have engrafted upon this Bill another provision, approved by the Commissioners in their second and most valuable Report—I mean the enabling a Judge in certain cases to make parties refer. But this requires to be guarded in a very careful manner, that abuse may not arise;

and I so far differ from the Commissioners as to be of opinion that the power should only be exercised in cases where a previous attendance before a Judge has given full warning to the parties of a reference being probably forced upon them, should they proceed instead of referring immediately. I will not say that cases may not occur where, until a certain progress has been made in the trial, it is difficult to determine whether or not the cause should be settled out of Court. But generally speaking, the great grievance of a reference is that it takes place after all the expenses have been incurred of bringing the case to *Nisi prius*, and that the arbitration entails the necessity of those expenses being again incurred, and a great deal more added. If, indeed, the Judge referred to the County Court a great part of this would be spared, from the procedure being so expeditious where the Arbitrator has no interest whatever in protracting it. Yet there would still be the objection to repeating much of the cost already incurred. I have, therefore, on the whole deemed it advisable to insert in the Bill no provisions of a compulsory nature, and only to deal with voluntary submissions, whether by general and prospective articles in partnership deeds, charter parties, policies, or by agreement in the particular case. That Arbitration ought to be with the Lawgiver a favourite—a course to be by all well devised means facilitated and encouraged, instead of being, as in our Courts it has been, an

object of aversion and discouragement—I hold to be quite clear upon every principle; and having so often failed in obtaining the assent of your Lordships to measures for establishing Courts of Reconcilement, I fondly hope that a substitute may be found for those measures in this great improvement of the Law of Arbitration.—I may add, that this Bill will naturally go before the Commissioners upon the Assimilation of the Mercantile Law in the three kingdoms. In Scotland there are in the Law of Arbitration one or two material differences from our English Law. One is of considerable importance, and I incline to prefer the Scotch principle. If the clause of submission in a partnership deed or other instrument specifies the Arbitrator, the Courts will enforce proceeding with the reference. With us this specification makes no difference; a party cannot be compelled to go on, nor can the agreement of reference to the arbitrator named be pleaded in bar. It will be for the Assimilation Commissioners to consider this among other points, and to report whether the English or the Scotch rule ought to prevail, if the present Law remains unaltered; but I trust that their approval of the Bill which I now present may at once and easily assimilate the Law in the two countries.

Further, it is to be presumed that the County Court Commissioners will fully digest the various statutes and incidental provisions respecting County Courts into one Act, repealing all those over which the Law on this important subject lies scattered. There are no

less than four Statutes devoted to those Courts exclusively, eleven which contain incidentally provisions relating to them, beside three others now passing through Parliament. It is impossible to figure any case in which a Digest of the Law can be more wanted. The great number of persons interested as Judges, Officers, and Practitioners, the still larger number as Suitors, renders it peculiarly desirable that the whole provisions of the Law relating to this branch of judicature should be brought into a narrow compass, and be accessible by reference to a single Statute.

When the jurisdiction of the County Courts shall be extended, and the other omissions in the existing Acts supplied, and when the Bankruptcy Law Commissioners shall have inquired into the best means of combining these tribunals with the Bankruptcy Courts; when such judicious arrangements shall be made as may facilitate the establishment of a local Bar in the greater provincial towns; and when the more frequent holding of Assizes, both for civil and criminal trials shall be the happy result of the diminished business in the Superior Courts—then we shall have the whole measure of 1833 at length established, and shall possess a tolerably complete system of Local Judicature. We may well view this consummation with satisfaction. Yet I own that in me such feelings are mingled with anxiety, if not with pain, when I consider the great change which it is working in our Judicial Institutions—its effects

upon the profession to which I am attached by every tie of respect and gratitude and affection; its effects, not upon the Bar alone, but upon the Bench, which from the Bar can never be dissociated—the Bar at once its parent, its nursery, and its helpmate. We are in a transition state; and I confidently hope that, although at present some cloud may hang over our prospects, yet by due regard to the interests of the suitor, and by effectual though cautious improvements in all the procedure of all the Tribunals, the prosperity of the Law's professors will be found to suffer no lasting injury from the advantages which have accrued to its subjects, their clients. Of one thing I am quite certain—the profession have gained as much as the Law itself, by having shewn themselves friendly to its improvement, and made it possible to leave all that concerns its amendment in the hands of skilful, learned, and experienced men. Other classes of the community have not been so wise, and they have suffered from their short-sighted resistance—they as well as the reform of the system they were attached to. The pain which I have confessed to feeling for the immediate, and I trust, temporary effect of these changes in the Law, had I not also felt it for other changes in which I bore a part? Who could but feel deep sympathy with our countrymen in the Colonies, reduced to distress, even to ruin, by the course of legislation in the Mother Country? Who could avoid lamenting over such cases as I lately presented

to your Lordships, in the Petition of Planters whose vast fortunes had been swept away with hardly any compensation? But those unfortunate men had themselves chiefly to blame. We were ever persuaded that the abolition of the traffic could only be executed by England, but that the freedom of the slaves, after means taken to prepare them for it, was far better left in the hands of the Colonial Governments, as I repeatedly urged more than half a century ago. But deaf to all warnings, they would not stir, at once to perform their highest duties, and consult their best interests. Wherefore England was compelled to interpose, and they who had resisted all timely reform, made themselves, as ever happens, the victims of revolution. The Lawyers have been better advised; they have aided, not thwarted, the progress of improvement; they have thus kept the needful changes in safe hands; and the reward of their wise foresight regarding their own interest, their early and liberal concession to the public weal, will be their remaining unscathed after the darkness of the hour has passed away.

My Lords, there are two subjects on which I must further address your Lordships, one connected with Local Judicature, both the one and the other often before broached by me in this House. I allude to the Jurisdiction of the Magistrates at Sessions, and to the conduct of business in both Houses of Parliament. It was expected when the Bill of 1833 came before your Lordships, that the Local Court Judge would be chosen by the

Magistrates as their Chairman, and the provision of that bill, introduced with this view, was adopted also in the Act of 1846, I mean the giving the County Court Judge authority to act as Justice within his district. The great advantage of such an arrangement is obvious; and, far from considering it in the light of abolishing the Sessions, as a Noble Friend of mine, but himself a Chairman of Sessions, did (Lord Salisbury), when last year I urged it upon the attention of your Lordships, I can only regard it as giving to that important jurisdiction a most useful assistance, and effecting upon it a great improvement. The aid of a learned person, filling a high judicial office, unconnected with any party, and respected by all, would in my opinion, be an acquisition of the greatest value to the respectable and useful body, who, by their own free choice, had raised him to preside over them. In Ireland there is hardly an instance of the assistant barrister not being gladly, and without opposition, chosen as Chairman of the Sessions. In England, I grieve to say, no instance has yet occurred of this choice falling upon a County Court Judge.

I pass to the other, and yet more important subject of our Private Bill Legislation; perhaps I should rather say our whole Parliamentary business. But that of Private Bills demands the greatest share of our attention. It is wholly unaccountable that this power should have grown up and its exercise assumed such vast dimensions, without any adequate provision for guiding and controlling it. Well might Lord

Langdale term it a truly transcendental authority which Parliament thus exercises. While all the Courts of Justice in the country are deciding questions that involve interests to the amount of thousands or hundreds of thousands, we are disposing of millions; and while they are acting by fixed rules and are only administering the law in each case, we are disposing of rights of property to this enormous amount, not only without any known law, but contrary to the law; setting aside settlements, breaking wills, violating men's vested rights, acting for or against infants and others incapable of consenting, or even of knowing what is done, nay, persons unborn, and who for years may not come into existence. But again, to consider the vast amount of the interests thus dealt with, and the necessity of both the facts and the rights being in each case thoroughly investigated, it surely never can be contended that the present manner of conducting these inquiries is the best, if it be not indeed the worst possible to be devised; that it either consults the great interest of discovering the truth, or the lesser, though very important interest, of giving dispatch and avoiding expense. A plan of proceeding was suggested nineteen years ago by the great man whose irreparable loss we have now to deplore; and though it referred to a particular kind of Bill, it was capable of universal application. The origin of the proposal was this. Towards the end of the Session 1834 a Bill came up from the Commons, providing that any Borough

charged with corruption might be disfranchised by a single vote of each House, agreeing to an address, and the address assented to by the Crown. When I saw this astounding measure, which would have enabled a Minister to disfranchise any number of Boroughs by obtaining in any way from the other House accidental votes, in which I felt afraid your Lordships would not very unwillingly have concurred, I saw that a great oversight alone could account for such a Bill having been passed; and I at once communicated with the illustrious Duke, then leading the opposition, and with my Noble Friend near me (Lord Ellenborough) one of his most distinguished supporters, appealing to them, whether they could take advantage of the blunder that had been committed, how favourable soever its operation might be to their anti-reform prejudices. As I expected, both those noble persons disclaimed any such wish, and the Duke promised to consider the subject with a view to amend instead of rejecting the Bill. Next day he informed me that a plan had occurred to him; he gave me the outlines of it, and he desired my assistance in filling it up, which, highly approving of the greater part, I most willingly gave. We went into the subject in detail, and, having agreed on the main principles, had the Bill referred to a select committee, where, after a full discussion, this plan was adopted.—In any case where corruption was alleged, a committee of twelve members of both Houses was to be appointed, seven of the Commons

and five of the Lords. These were to sit under the presidency of a Judge, who should decide on questions respecting the admission or rejection of evidence. A report, in the nature of a special verdict, should then be made on the facts proved. This report should be conclusive on those facts, and nothing more. A Bill might then be brought into either House, and should go through all the usual changes, excepting only that no further evidence should be taken in the Committee. My recollection is not distinct as to whether a new inquiry might be directed by either House in a similar joint Committee of twelve; but this is immaterial, for all must at once perceive that in hardly any instance would an unwillingness be found to abide by the result of the first inquiry. When I express my admiration of this plan, I speak without the least claim to a share in it; on two points only did I venture to differ with my illustrious friend; the presidency of a Judge which I suggested, and the proportion of the members between the two Houses; which he at first thought should be that of equality; but afterwards, with his wonted candour, agreed should be seven and five.

This plan was adopted by the Committee without a dissentient voice; the bill was amended accordingly and reported to the House; it passed unanimously through its after stages, and was sent down to the Commons. There my Noble Friend (Lord J. Russell), frankly admitted the faults of his

measure, and entirely approved of the manner in which we had corrected them. But as the whole Bill had been altered, as we had in truth sent down an entirely different Bill, there was an obvious reason against passing it by the single vote of agreeing to our amendments—the very argument, indeed, used against the Bill as it originally came up to us from the Commons. The result was that it stood over to another Session, and it has never since been taken up.

That precisely the same plan might be adopted in every case of a private Bill, I have no manner of doubt. And an opportunity soon occurred of considering this general application. In 1837 I brought before your Lordships the whole subject of Private Bill Legislation, and you were pleased to appoint a Committee to examine what changes should be made in our standing orders on this subject. Before going into the Committee, I naturally conferred chiefly with the Duke, reminding him of our plan in 1834. My Noble Friend near me (Lord Ellenborough) joined us in considering the whole matter when the Committee met. I stated to the Duke that there seemed three courses open to us, and asked which he felt disposed to recommend. There was the most effectual one, his plan of a joint Committee, but this required the concurrence of the other House. There was the adoption of new standing orders requiring Select Committees of five in each case, and to sit from day to day. There was a third

plan, but so ineffectual that we at once rejected it. The Duke was clearly of opinion that I should try the best plan, and he said, "If they wont take that, you can retreat upon the other." I need hardly add, that with his accustomed straightforwardness he supported the proposition; but we were unable to carry it, chiefly because it was more than could be accomplished by this House alone. After considerable discussion, we adjourned, in order to give time for the consideration of another plan suggested by one of the Committee. This was almost unanimously rejected, and the Report was without any dissentient voice made in favour of the new Standing Orders, to which I had the satisfaction of obtaining also the unanimous consent of your Lordships. We expected that the Commons would have adopted them; but for many years this did not happen; it was only in 1846, I think, that the great improvement in our procedure became common to both Houses.

That it has effected a most salutary change—that it is a very great improvement upon the former system—I most entirely admit. But it leaves much to be done; leaves more evil by a good deal than it has remedied. With the view of supplying this defect, I ventured in 1846 to lay before your Lordships a series of Resolutions, directing the formation of a Board of competent professional men, irremovable like the Judges, not to supersede the functions of either House, but to aid both Houses, by conducting the whole inquiry into the facts of each case, and only

rendering the stages of the Committee and Report on any Bill unnecessary, but this also subject to the control of each House, so far as regards further inquiry, or referring back or disapproval of the Report. The state of the business in both Houses, but more especially in the Commons, has come to be such as renders some measure of effectual assistance absolutely necessary; and in consequence probably of these Resolutions and the Orders of 1837, I have had the honour of a communication with the highest authority there upon this subject. I rejoice to find that the matter has thus been entered upon. It cannot be in better hands. Were I to join in the universal chorus of respectful praise which rises to that eminent individual, I should be doing a most superfluous act; but I may be allowed to bear my testimony to the great merits of the plan now in contemplation, and my satisfaction with it, notwithstanding some material differences from my own. To shew the absolute necessity of a change we need only recollect that in one year (the year before the Resolutions) there were 241 Private Acts passed, containing 13,624 sections and schedules, beside perhaps half as many which were thrown out.

But when we shall have put this branch of legislation upon a right footing, surely we cannot stop short of the other, and leave the preparation and passing of Public Acts in its present most unsatisfactory state. How often have men of all parties avowed their ardent desire to see this grievous defect remedied,

whether by appointing a Minister of Justice, or a Board, or a Board acting with or under that functionary. All men are agreed on the evil. No one denies or doubts its magnitude. Yet I remember a lamented friend of mine, in this House, one of the most sagacious of observers (Lord Ashburton), saying—"This is, of all the improvements you have ever propounded, the most undoubtedly required; and, nevertheless, you will find it easier to carry all the rest than this." I would fain hope that the time approaches when the difficulty may be overcome; and if the plan now under consideration in the other House, shall next Session be there adopted, and extended to our proceedings here, I really do not despair of seeing the whole mechanism of our Legislation at length framed upon principles which by deserving, may command respect.

I will not detain your Lordships with any apology for having so long trespassed upon your patient attention, for which, however, I have to offer my respectful thanks. Whatever functions this House may exercise, believe me there is none so important as that which connects it with the Department of Justice. We can never be better employed, or more certainly secure our footing in the State, than by duly administering the Law, and anxiously watching over its amendment.

Order of the day discharged for the second reading of the County Courts Further Extension Bill.

Arbitration Bill read a first time.

NOTE.

1. The Procedure Bill passed with very material omissions. Of these the most to be regretted are the 38th, 39th and 44th clauses for Verifying Pleadings, the 119th giving the option of trying causes and writs of inquiry by the Judge without a jury; above all, the Equitable Jurisdiction clauses, 191 to 204. All these great amendments of the law, agreed to without any opposition in the Commons, are for the present postponed: but as they must soon be introduced into English Procedure, their adoption in Ireland will be a matter of course. In the meantime, the Irish Bill, as ultimately passed, contains important provisions for the amendment of the law, not yet adopted in England. Those relating to forms of action, venue, pleading, generally the substitution of natural for technical procedure (Sects. 61, 62, 62, 70, 71 of the Act), production of deeds (S. 64), execution (132 *et seq.*) recovery of mesne profits in ejectment (195), payment of money into Court (75), are all great improvements upon the English Procedure Act, although the last provision has, in the absence of Lord Brougham and Mr. Whiteside, been rendered less beneficial than it should have been by the same kind of error which was committed in passing the Evidence Bill of 1851. Finally, the repeal, total or partial, of 36 Acts, and the digesting of the whole Law of Procedure as

contained in the Irish Statutes, is of itself no little advantage gained to the community as well as the profession.

2. Three important Commissions have been issued; one for inquiry into all that relates to County Courts; another for inquiry into the Jurisdiction in Bankruptcy; a third for inquiry into the means of Assimilating the Mercantile Law in the different parts of the United Kingdom.

The County Court Commissioners are the Master of the Rolls, Mr. Justice Erle and Mr. Justice Crompton, Messrs. Koe, Serjt. Dowling and Pitt Taylor, County Court Judges, Messrs. Fitzroy, M. P., Under Secretary of State, and Mullings, M. P. and Mr. Keating, K. C. Mr. H. Nicol, of the Treasury, is Secretary.

The Assimilation Commissioners are Mr. Smith (Master of the Rolls in Ireland), Lord Corriehill (of the Court of Session in Scotland), Mr. Justice Cresswell, Messrs. Bramwell and Anderson, K.C. Mr. Bazley of Manchester, and Messrs. Hodgson and Slater of London.

The Bankruptcy Commissioners are Mr. Walpole, Sir G. Rose, Messrs. Swanstone, M. D. Hill and Bacon, K.C., Mr. Holroyd, Mr. Cooke, and Mr. Carr Glyn, M.P.

The Assimilation Commissioners are to inquire also, into the important question of Limited Partnership, the subject of Mr. Slaney's useful labours.